Supreme Court, U. S.
FILED
OCT 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5309

EDMUND MULCAHY,

Petitioner,

—*v.*—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

JON K. HOLCOMBE
District Attorney
Onondaga County Courthouse
Syracuse, New York 13202

Patrick Connelly, Esq.
John A. Cirando, Esq.
Assistant District Attorneys
of Counsel

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(6855)

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Facts	2
I — The decision below is correct and there is no conflict of decision	7
CONCLUSION — For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied	13

Table of Cases:

Alderman v. *United States*, 394 U.S. 165	10
Blackburn v. *Alabama*, 361 U.S. 199	9
Brady v. *United States*, 397 U.S. 742	11, 12
Culombe v. *Connecticut*, 367 U.S. 568	8
Johnson v. *Zerbst*, 304 U.S. 458, 464	10
Miranda v. *Arizona*, 384 U.S. 436	8, 10
People v. *Estrada*, 23 N.Y.2d 719 cert. den. 394 U.S. 953	10
People v. *Flowers*, 30 N.Y.2d 315	11
People v. *Leonti*, 18 NY2d 384, cert. den. 389 U.S. 1007	9
People v. *Montgomery*, 27 N.Y.2d 601	11
People v. *Schompert*, 19 N.Y.2d 300	9
Simmons v. *United States*, 390 U.S. 377	10
Spano v. *New York*, 360 US 315	7
Townsend v. *Sein*, 372 U.S. 293, 307	8
U.S. ex rel Everett v. *Murphy*, 329 F.2d 68	9
U.S. v. *Jackson*, 390 U.S. 570	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5309

EDMUND MULCAHY,

Petitioner,

—*v.*—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Onondaga County Court's memorandum of law, dated January 8, 1974, is not published. There was no opinion filed by the New York State Supreme Court, Appellate Division, Fourth Department when it unanimously affirmed the judgment of conviction (44 A.D.2d 911). The New York State Court of Appeals (Jasen, J.) denied leave to appeal on June 28, 1974.

JURISDICTION

The requisites for jurisdiction are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether or not the State courts properly held petitioner's confession voluntary?

2. Whether or not the petitioner's plea of guilty to the reduced charges was proper?

STATEMENT OF THE CASE

Petitioner and two co-defendants were indicted for CONSPIRACY IN THE SECOND DEGREE (2 Counts), CONSPIRACY IN THE FIRST DEGREE, BURGLARY IN THE FIRST DEGREE (2 Counts), ROBBERY IN THE FIRST DEGREE (2 Counts), MURDER (3 Counts), GRAND LARCENY IN THE THIRD DEGREE (2 Counts), and POSSESSION OF A WEAPON. The indictment concerned the slaying of one Leonard Morrison on March 12, 1973.

Pursuant to an oral motion, a Huntley hearing was held on May 25, 1973 [H-1], continued on June 15, 1973 [H-2], and terminated on October 24, 1973 [H-3] in Onondaga County Court (Gale, J.). On January 2, 1974, the petitioner's motion to suppress his confession was orally denied. By memorandum decision, dated January 8, 1974, the said motion was formally denied.

On January 4, 1974, several days after jury selection had commenced, petitioner pled guilty to the crimes of MANSLAUGHTER IN THE FIRST DEGREE and ROBBERY IN THE SECOND DEGREE in full satisfaction of the aforementioned indictment. Petitioner was subsequently sentenced to serve concurrent terms of imprisonment having a maximum of twenty years on each charge.

FACTS

At approximately 2:00 p. m. on March 15, 1973, petitioner was arrested by the New York State Police, near McGraw, New York, advised that he was a homicide

suspect and further advised of his constitutional rights (H-1, pp. 2-4, 9-10). Petitioner did not appear to be under the influence of any intoxicant (H-1, p. 7). After being transported to the State Police substation at Cortland, New York, petitioner was thereupon transported, at approximately 2:55 p. m., to the Syracuse New York Police Department and placed in their custody at approximately 3:30 p.m. (H-1, pp. 5-6).

Subsequent to the completion of the interrogation of a co-defendant at 5:45 p.m., Sergeant William Hunter of the Syracuse Police Department was then assigned to interrogate petitioner (H-1, p. 17). Hunter had been advised that petitioner had already been advised of his constitutional rights; the following initial and taped conversation then ensued (Transcript of Interrogation, pp. 2-3):

> HUNTER: . . . you don't have to talk to me . . .
> PETITIONER: No, I want to talk to you.
> HUNTER: You have been advised of your rights, right?
> PETITIONER: That's right.
> HUNTER: You know what your rights are... You know what your rights are and you were advised of them. Having been advised of them, will you talk to me without having an attorney here?
> PETITIONER: Will I talk to you?
> HUNTER: Will you talk to me, without having an attorney here?
> PETITIONER: Yes.
> HUNTER: You know what your rights are, - you don't have to.
> PETITIONER: Talk to you.
> HUNTER: You know that, right?
> PETITIONER: Well, I will talk to you.
> HUNTER: You can stop talking when you want to ...
> PETITIONER: Yes, sir.

The tenor and substance of the ensuing conversation between the two men was to the effect that: Hunter demanded that petitioner be truthful with him; Hunter never stated to petitioner that he would be released if he told his side of the story; and petitioner may be able to help himself (mitigate criminal responsibility) if he told his side of the story. However, nowhere does it appear that petitioner would be given assistance on a less serious charge if he were to tell his side of the story. Furthermore, nowhere does it appear that petitioner would be absolved from criminal responsibility if he told his version.

After petitioner confessed orally, Hunter then took his affidavit himself and finished at approximately 8:20 p.m. (H-1, pp. 24-25). Petitioner signed the affidavit after having read the constitutional warnings contained therein (H-1, pp. 25-26). The "constitutional rights" portion of the affidavit was signed prior to the typing of the body of the affidavit (H-1, pp. 26-27). Hunter further testified that at no time did he make any promise to the petitioner, and that he neither threatened him in any way, nor subjected him to physical abuse of any sort (H-1, p. 28).

At all points in the proceeding, petitioner continually responded that he had been fully advised of his rights, understood them, and had read his constitutional warning from the affidavit before subscribing it (H-1, pp. 58-59).

Petitioner further testified:

(1) That he had been advised of his rights before talking to Sergeant Hunter, that he indicated that he understood them, that he was asked if he wanted an attorney present, that he would speak to Sergeant Hunter without an attorney being present (H-1, pp. 60-61);

(2) that he was told he was a suspect in a homicide case; that no promises of a reduced charge were made; that there was no discussion of any term of imprisonment

or any lighter sentence; that there were no threats of physical violence or injury; that he was not struck; that he was only questioned by Sergeant Hunter during this time (H-1, pp. 62-63);

(3) that the State Police had read his "Miranda rights" to him from a card (H-1, pp. 65-66);

(4) that the person he knew as the "Captain" advised him of his constitutional rights and he refused to speak with him and he left (H-1, pp. 73-74);

(5) that the "Captain" neither made any promises on a recommendation to a Judge or District Attorney, nor made any promises on a jail sentence if he co-operated (H-1, pp. 75-76);

(6) that he made no requests of the "Captain"; that he was not threatened by the "Captain" (H-1, p. 77);

(7) that he was not threatened in any way by the Police; that there weren't any specific promises made to him (H-1, p. 77).

Syracuse Police Captain Robert McCarthy testified that it was he who assigned Sergeant Hunter to interrogate petitioner; that neither he nor anyone else to his knowledge had spoken with petitioner, and in fact, he ordered that no one interrogate petitioner but Sergeant Hunter (H-2, pp. 7-8, 11-12, 14-16).

First Deputy Chief of Police, John C. Dillon, testified that prior to Sergeant Hunter's interrogation of the petitioner, he had spoken with him and asked him his name, age, background, military service, his whereabouts for the prior few days, whether he resided in the house where the murder victim was found, and his employment (H-3, p. 3). Dillon did not recall asking the petitioner any specific questions regarding his possible involvement in the victim's death and the petitioner did not make any specific request of him (H-3, pp. 4, 19), including any request for an attorney (H-3, p. 19).

Upon initial investigation of the case, Dillon entered the apartment that had been occupied by the victim as well as another apartment; not petitioner's apartment (H-3, p. 5). A warrantless search was conducted of the above premises (H-3, p. 6) at this time, but Dillon personally did not remove any physical evidence (H-3, p. 7). He did recall, however, seeing a towel at the Public Safety Building although it was never ascertained exactly where the towel came from (H-3, pp. 8, 15).

Petitioner then again took the stand and testified that he had asked Dillon "to have the right to an attorney" twice (H-3, p. 11) - once when Dillon was asking questions regarding defendant's background (H-3, pp. 11-12) and once while Dillon was talking about getting the electric chair back into use in New York (H-3, p. 12). At this point, Dillon allegedly stated "you will get an attorney in the morning (H-3, p. 12) (upon arraignment)" (H-3, p. 20).

Upon interrogation by Hunter, petitioner went on to state that Hunter exhibited a towel before him and stated: "Look Mulcahy, we have got the towel." (H-3, p. 13). However, he openly admitted that Sgt. Hunter had fully advised him of his rights before he began questioning (H-3, p. 13; see more particularly H-3, pp. 21-22); that he was unable to identify the towel (H-3, pp. 14-15); that Hunter did not ask him if it was his towel (H-3, p. 15); that Hunter did not tell him that the towel had been involved in the murder (H-3, p. 15); that Hunter neither told him that the blood of the victim had been found on the towel nor had he related where the police had obtained the towel (H-3, p. 15). Once again, the petitioner admitted that he did not recognize it as one of his towels (H-3, pp. 15-16) and that he did not see any stains on the towel that could have been blood (H-3, p. 16). During Hunter's interrogation, petitioner testified that he mentioned to Hunter that "I should have an attorney present for this;—I mentioned it to him just

slightly....I believe I mentioned to Sergeant Hunter that I would have liked to have an attorney present" (H-3, p. 22). Hunter allegedly said nothing to this remark and walked out of the room and later on came back with the towel (H-3, p. 22).

I

THE DECISION BELOW IS CORRECT AND THERE IS NO CONFLICT OF DECISION.

The Court below holding that petitioner's confession was voluntary did not deprive him of due process of law in accordance with the 14th Amendment of the Constitution. The factual findings by the Court below as to the voluntariness of petitioner's confession have substantial support in the Record and justified the legal conclusions drawn by that Court.

The "issues" raised by petitioner are questions of fact that he seeks this Court to decide in his favor. Petitioner has, however, gone to great lengths in attempting to convert these factual questions into legal and Constitutional questions in an attempt to justify review by this Court on Certiorari. However, there are no important questions of Federal law requiring decision by this Court.

. . . as to the Pre-Indictment custodial interrogation of Petitioner.

Petitioner would lead this Court to believe that in Spano v. New York (360 US 315), it "held" that police interrogation is to be limited to unsolved cases. However, that which Spano states is that a post-indictment lengthy and continuous interrogation of a defendant held incommunicado "must be examined with the most careful scrutiny". Clearly, there was no such lengthy interrogation of the petitioner in this post-arrest, pre-indictment situation where the police were attempting to solve a

crime. Questioning suspects is indispensable in law enforcement as long as such detention and examination is not coercive (Culombe v. Connecticut, 367 U.S. 568). A review of the record clearly demonstrates that such "detention and examination" was not coercive and that petitioner knowingly and voluntarily waived his constitutional rights.

. . . as to the Voluntariness of Petitioner's confession.

Petitioner seeks to urge that this Court rule that once a suspect has proclaimed his innocence all police questioning must cease. To do so would, effectively, exclude confessions from the judicial process, and require this Court to overturn its holding in Miranda v. Arizona, (384 U.S. 436):

> (W)e do not find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, or course, admissible in evidence....Volunteered statements of any kind are not barred by the Fifth Amendment ... (at 478).

A review of the "totality of circumstances" surrounding the statements made by the petitioner discloses that his statements were the product of a free and rational choice. Petitioner was certainly not deceived by a misstatement of fact, nor by his own testimony was his confession the result of force or threats. There were no promises made, by the petitioner's own testimony, which would create a substantial risk that he might falsely incriminate himself.

Moreover, petitioner's claim of alcohol withdrawal symptoms at the time of his confession does not ipso facto render his confession invalid. The petitioner's will had not been overborne by the interrogation (Townsend v. Sein, 372 U.S. 293, 307) and his "level of

intoxication" had not risen to a degree of mania (People v. Schompert, 19 N. Y. 2d 300; see also Blackburn v. Alabama, 361 U.S. 199). It should be noted that petitioner's counsel stipulated that his client was "normal" as opposed to being "intoxicated" based on a doctor's examination several hours after the interrogation concluded (H-2, p. 4).

As the record so conclusively establishes, at no point in time did Sergeant Hunter deceive the petitioner. Indeed, if deception was at all employed, it certainly was not utilized to a degree of depriving petitioner of due process of law (cf: U.S. ex rel. Everett v. Murphy, 329 F.2d 68).

It is clear that petitioner's confession resulted from a free and rational choice on his part to make a statement after having been fully and effectively advised of his constitutional rights.

. . . as to incrimination and right to counsel.

In regard to petitioner's claim that the police refused to impliment his constitutional rights, it is respectfully submitted that by his own testimony, as well as the several prosecution witnesses who testified, petitioner neither indicated in any manner that he wished to consult with an attorney before speaking, nor did he indicate in any manner that he did not wish to be interrogated. Concededly, if he had effectuated either of these rights, the questioning must have terminated. Certainly, this is not the case here.

Petitioner's claims in this area are nothing more than an attempt to engage this Court as arbitrator in a "contest of veracity between the police and himself", a point which has already been decided against him by the County Court. Moreover, that decision is overwhelmingly supported in the record (see People v. Leonti, 18 NY2d 384; cert. den. 389 U.S. 1007).

. . . as to waiver of rights.

Upon the record, it is clear that petitioner had been fully and completely advised of his rights, that he made a knowing and intelligent waiver of his rights and that the admissions were fully and voluntarily given. In line with the well recognized mandate that for a waiver to be effective it must be established that there was "an intentional reliquishment or abandonment of a known right or privilege" (Johnson v. Zerbst, 304 U.S. 458, 464). The record is unequivocal in this regard. While in custody, petitioner was given a full and effective warning of his rights. He was aware of his right to consult an attorney before being interrogated. He was also aware of his right to remain silent and that anything he said could be used against him. In these circumstances, the constitutional safeguards laid down by this Court in Miranda v. Arizona (384 U.S. 436) during a period of custodial interrogation have been effectively waived.

. . . as to his confession being the product of an "illegal search and seizure".

Only a victim of an illegal search and seizure has standing to move to suppress or to object on that ground (Alderman v. United States, 394 U.S. 165). In order to be a victim, the petitioner must own, occupy or control either the place searched (or be legitimately on the premises when the search occurs) (Simmons v. United States, 390 U.S. 377), or the object which was seized (People v. Estrada, 23 N.Y. 2d 719; cert.den. 394 U.S. 953). Clearly, petitioner lacked the requisite standing to move to suppress the allegedly illegally seized towel since by his own admission he denied ownership or recognition of the towel (H-3, pp. 14-16), never established from where the towel was procured and failed to attempt to move to suppress the towel.

. . . as to the Petitioner's plea to the reduced charge.

After the Court had recessed on the second day of jury selection, the District Attorney made a statement for the record. In the presence of the Judge, the petitioner, his attorney, and his parents, the District Attorney renewed his offer of a reduced sentence to accept a plea to a lesser offense in full satisfaction of the indictment to the petitioner in exchange for a guilty plea and furthermore that if the bargain was refused at this time, he would not renew it and would prosecute on all charges in the indictment. The next morning the the offer was accepted. The petitioner now alleges that this deprived him of his right to counsel.

The applicable requirements for a guilty plea (i.e. voluntary and intelligent) mandated by this Court in U.S. v. Jackson (390 U.S. 570) were fully satisfied. Applying, the "voluntary" tests set out in Brady v. United States (397 U.S. 742), it is clear that there was no harassment, misrepresentation, bribery, or mental coercion overbearing petitioner's will. The New York Court of Appeals has properly equated the term "undue pressure" with this Court's aforementioned Brady proscriptions (People v. Montgomery, 27 N.Y.2d 601; see also People v. Flowers, 30 N.Y.2d 315 - an extreme example of coercion or undue pressure occurring when a defendant, to avoid being further abused or beaten, pled guilty to a lesser charge to obtain a prison transfer).

Obviously, no allegation of such coercion or undue pressure is made and neither did the Respondent "overbear the will of the petitioner". In fact, the Court below told the petitioner that it would not accept a guilty plea if it was motivated by coercion (Plea Minutes, page 2):

> THE COURT: Do you want to stand up against the end of the table? Before any plea is entered, Mr. Mulcahy, I want to get one thing straight on the record. I won't accept this plea if you feel there has been any ultimatum issued by the District

Attorney. All he told you was if this case was to be settled by way of plea, it had to be done this morning before he got down to subpoena all his witnesses. Is that understood?

THE DEFENDANT: Over the course of ten months, I have had more than enough time to weigh this over and will enter this plea with that understanding that you have mentioned.

THE COURT: Very well.

The "intelligent" tests set forth by this Court in Brady were, again, fully satisfied. The petitioner was represented by counsel, he was aware of the nature of the charge and potential sentence, and he was in control of his mental faculties.

Therefore, the plea was voluntary and intelligently made in accordance with the standards mandated by this Court and applied by the New York courts.

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

JON K. HOLCOMBE
District Attorney
Onondaga County Courthouse
Syracuse, New York 13202

Patrick Connelly, Esq.
John A. Cirando, Esq.
Assistant District Attorneys
of Counsel

Dated: October 11, 1974